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Thomas Duve

German Legal History: National Traditions and Transnational Perspectives

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Abstract

In this article, I review select institutional and analytical traditions of Legal History in 20th century Germany, in order to put forth some recommendations for the future development of our discipline. A careful examination of the evolution of Legal History in Germany in the last twenty-five years, in particular, reveals radical transformations in the research framework: Within the study of law, there has been a shift in the internal reference points for Legal History. While the discipline is opening up to new understandings of law and to its neighboring disciplines, its institutional position at the law departments has become precarious. Research funding is being allocated in new ways and the German academic system is witnessing ever more internal differentiation. Internationally, German contributions and analytic traditions are receiving less attention and are being marginalized as new regions enter into a global dialogue on law and its history. The German tradition of research in Legal History had for long been setting benchmarks internationally; now it has to reflect upon and react to new global knowledge systems that have emerged in light of the digital revolution and the transnationalization of legal and academic systems. If legal historians in Germany accept the challenge these changing conditions pose, thrilling new intellectual and also institutional opportunities emerge. Especially the transnationalization of law and the need for a transnational legal scholarship offers fascinating perspectives for Legal History.

Thomas Duve*

German Legal History: National Traditions and Transnational Perspectives

The political, institutional and pragmatic conditions under which scholarship in the humanities, cultural studies and social sciences is being produced are currently undergoing radical changes. The same applies to the field of law. For nearly 25 years, our higher education and research system as well as the legal system have been facing an increasingly dynamic process of transnationalization, economization, and digitization. As historians of science, we are aware that changes in the institutional and pragmatic conditions of scholarship have important disciplinary implications. Questions, approaches, responses, and outcomes are all equally affected. What if this observation also holds true for Legal History as a discipline and for us as legal historians? How have the institutional and intellectual frameworks of our field changed? What do these changes mean for the future of our field of study? What new options are opening up owing to these changes?

In what follows, I respond to these questions from the perspective of a German legal historian who is interested in the emerging discipline of Transnational Legal History. This special interest, which not all my colleagues necessarily share, and my own German perspective might ultimately bias my analysis. Yet, I am convinced that as a discipline, Legal History finds itself in a crisis of sorts and simultaneously in a highly promising situation. The crisis is about the eroding traditions, while the promise derives from the emergent institutional and intellectual settings. As always, our judgment on where we are and where to go to depends on our perspective. But there is a need for reflection.

This year is a good time to devote to review our traditions, the current status of our field, and on our future options, [1] because in Frankfurt, we are celebrating a unique triple anniversary reflect: The University of Frankfurt (Main) and its Law Department have turned one hundred; the Max Planck Institute for European Legal History is celebrating its 50th anniversary; and it is a quarter century since the Wall fell in 1989, symbolizing the end of two opposing blocs in Europe, which has opened a new chapter in world politics and modern history.

Taking the triple anniversary as our collective platform, I proceed in four steps to call to mind our traditions, following which I discuss the trends that emerge from this long-term-perspective. My starting point is 1914. I look back at the 100 years to begin to outline the contours of legal scholarship in Germany in 1914 and to show the value of a long-term perspective on the history of this science for reflecting on the future of the discipline (Part 1). I then go on to elaborate on the traditions that constituted Legal History as a distinct discipline in Germany after WW2, both during what came to be designated as the *Bonner Republik* – the period from the end of the Second World War to 1989 (Part 2) – and in the *Berliner Republik*, which spans the period from 1989 to the present (Part 3). Lastly,

* Large parts of the following text draw on an article to be published in German in Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV), 2, 2014. This is an extended version of a lecture given on the occasion of the 100th anniversary of Frankfurt Law Faculty within a lecture series on traditions and perspectives of legal scholarship, organized by the Faculty of Law and the Cluster of Excellence ›Formation of Normative Orders‹ in February, 2014. Other parts of these reflections were presented on a conference given in Buenos Aires at the Instituto de Investigaciones de Historia del Derecho in April, 2014, and at the Nantes Institute for Advanced Study in May 2014. I am grateful for the discussions on these occasions. My special gratitude goes to Lisa P. Eberle for her translation and critique of the German text written for KritV which served as a starting point for this article and also to Gita Rajan for the revision of the final text.

1 In a way, I am continuing with this my previous work on the history of historiography on European legal history, Duve (2012); Duve (2013).

I conclude by outlining some challenges Legal History faces as a discipline and the tasks ahead. In this part, I advocate working toward a Legal History that is conscious of its traditions and follows some established paths, but at the same time is open to transnational or global perspectives on Legal History and contributes to an evolving transnational legal scholarship (Part 4).

1 1914 and 2014: Far Away, So Close

1.1 Founding of the University of Frankfurt am Main

Looking back at events that happened a hundred years ago, such as the founding of the University of Frankfurt a. M., the historical distance might almost seem overwhelming at first glance. For example, the beginning of the foundational articles of the University evokes a world foreign to the modern reader: »We, Wilhelm, King of Prussia, by the grace of God want to give through our edict of June 10th 1914 the following statutes to the newly founded University at Frankfurt a. M.«[2] But, in fact, modernity had already caught up with the German Empire and founding the University of Frankfurt was a considerable step toward the modernization of the German higher education and research system. Frankfurt University was the last university founded by the emperor, but during this reform period in the early twentieth century, it was by no means an isolated effort. The reasons that motivated these reforms were complex.[3] Since the turn of the century, if not earlier already, elite members of the bourgeoisie were becoming increasingly convinced that only the sciences measured up to the task of tackling the historical changes in the world that engulfed them. Moreover, science had evolved into a substantial »*Großbetrieb der Wissenschaft*«.[4] Especially in the West, the market for research had considerably expanded, in light of which the economic, political and social elite in Germany believed that Germany had to enter the scientific arms race in competition with other countries. In their opinion, Germany was lagging behind the US, France, and even Norway where institutions, such as the Carnegie Foundation, the Pasteur Institute, or the Nobel Institute, were not just better equipped, they were smaller, and more flexible than the Academies of Sciences and the universities in Germany. Thus, at the advent of the 20th century, a series of private sector initiatives were launched that aimed to enhance German competitiveness in research. The foundation of the Kaiser-Wilhelm-Society in 1911, the later Max-Planck-Society, represented one such response to similar demands from the industry and an important step in closing this perceived gap. It held up the hope that Germany would be able to secure a place in a research world that was becoming increasingly international.[5] In short, Germans looked with concern, especially to the English-speaking world, while at the same time the world looked with even greater concern upon an Empire as it armed itself on all fronts.

Obviously, the motives sketched out here did not just underlie the reforms in the science system. A general climate of reform had persisted since late 19th century – just think of Max Weber's famous Freiburg conference from 1895.[6] In 1913 – few months before the foundation of the University of Frankfurt – the Prussian historian Otto Hintze addressed this atmosphere of anticipation and fear in his commemorative address on the occasion of the 25th anniversary of the reign of Wilhelm II:

> »Rarely has a generation felt as strongly as the contemporary one that they stand at the beginning of a new eon. In technology and transport, in art and in our perception of the world, in economic life as well as in the relations between peoples and states great and world-shaking changes are taking place that together herald a

2 »Wir Wilhelm, von Gottes Gnaden König von Preussen etc., wollen der durch Unseren Erlass vom 10. Juni 1914 neu begründeten Universität zu Frankfurt a. M. die nachfolgende Satzung hierdurch verleihen«, Satzung der Königlichen Universität zu Frankfurt a. M. (1914).

3 For an overview see John (2010); Szöllösi-Janze (2002); Paletschek (2010); Metzler (2010); Schiera (1992) 211 ff.

4 This expression became particularly influential through Harnack (1911).

5 Nowak (2002) 56.

6 Max Weber's words from his inaugural address at Freiburg in 1895 are a forceful expression of these sentiments: »Es wird uns nicht gelingen, den Fluch zu bannen, unter dem wir stehen: Nachgeborene zu sein einer politisch großen Zeit – es müßte denn sein, daß wir verstünden, etwas anderes zu werden: Vorläufer einer größeren«, Weber (1971) 1.

new era for humanity's existence and also for our own people.«[7]

The University of Frankfurt was established in these troubled and expectant times. The year of its foundation not only coincided with the outbreak of WW1. Its formation also marked the end of an era and was part of the transition from the *res publica litteraria* to the modern academic system.[8] It responded to a liberal, socially sensitive, and economically invested bourgeoisie, and as such, it was an early expression of what came to be denoted as »the scientification of the social« in the 20th century.[9] Organizing the university as a trust – an innovative concept for a German university – was meant to ensure freedom and separation from the state. In Frankfurt, this was meant to benefit Jewish scholars, in particular, and the research on the social implications of industrialization. The express aim of the donors, especially from the industry, was that the urgent questions of the moment be tackled. In particular, the Law Department of the new university was charged with studying social and economic questions.[10]

1.2 Legal Scholarship in the Late Wilhelminian period

The spotlight on the political, social and intellectual circumstances during the years of the University's foundation might already indicate that, despite the seeming incommensurabilty between 2014 and 1914, there are at least some surprising commonalities between the pre-WW1 world-diagnostics and today's discourse on the science system: Today, as in the early 20th century, concerns revolved around the dramatic changes in the world due to accelerated communication systems and the expanded scope of international trade, with existing and new markets on world stage. People were convinced – as we are today – that they were living in a period of accelerated change. The science system was exposed to transnational market mechanisms and German academia was seeking ways to maintain its competitiveness. Especially the English-speaking world seemed a threat to Germany's once leading role in academia – it was not by chance that the *Kaiser-Wilhelm-Gesellschaft*, inspired by the ›Royal Society‹, had been named as such. There were private funding initiatives for research and knowledge transfer from academia to industry and to society at large. Science, not the humanities, was viewed as the main motor of transformation in the science system. Wilhelm von Humboldt and his idea of an integrative scholarship were often cited and scholars like Adolf von Harnack or Max Planck seemed to offer the implicit guarantee that sciences and the humanities would remain connected. But the main aim was to create a powerful science system, as a precursor to economic development. The notion of *Grundlagenforschung*, which expressed the idea that ›basic research‹ should fill a gap between the National Academies of Sciences and the universities, continues to be invoked even today notwithstanding the semantic differences between what it meant initially and what it is being used for today. The so-called three pillars of the German scientific system – Academies of Sciences, universities and independent research institutions – also stem from this pre-war period. Thus, there are some striking structural similarities between the academic world in 1914 and in 2014.

Unexpected similarities show up again between 1914 and 2014 when revisiting legal scholarship around 1914. One similarity lies in the growing awareness of the significance of the international context of national laws. Soon after the outbreak of WW1, many observers realized that this war had also been a consequence of profound transformations that had occurred in the last decades of 19th century, which in turn raised questions about the state, its laws, and its international – in fact,

7 »Kaum ist in einem Geschlecht je so stark wie in dem gegenwärtigen die Empfindung lebendig gewesen, dass es am Anfang eines neuen Weltalters steht. In Technik und Verkehr, in Kunst und Weltanschauung, im Wirtschaftsleben wie in den Beziehungen der Völker und Staaten untereinander vollziehen sich große weltbewegende Veränderungen, die in ihrer Gesamtheit einen neuen Abschnitt im Leben der Menschheit und auch unseres eigenen Volkes bedeuten«, Hintze (1913) 79.

8 Osterhammel (2009) 1105 ff., for more about the influences and changes see: Vom Brocke (1990) 84 ff.

9 »Verwissenschaftlichung des Sozialen«, Raphael (1996).

10 For further information on the history of the University of Frankfurt see Hammerstein (1989); Hammerstein (2012), in particular also the notes on the programmatic reflections of the law department, in Hammerstein (1989) 29–30. On the influential founding father Wilhelm Merton see Roth (2010). On the history of legal scholarship at the University of Frankfurt see Diestelkamp / Stolleis (1989).

›planetary‹ [11] – environs. At the same time, WW1 seemed a necessary corollary to the profound transformations within the state system. [12] More fundamentally, some legal scholars in Germany had serious doubts as to whether the course legal scholarship had taken by the end of the 19th century, with a legal system that was so focused on state-law and was based on liberal paradigms, could measure up to the complex realities of the emergent world. In his *Grundlegung der Rechtssoziologie*, published in 1913, Eugen Ehrlich observed that »[t]he most important legal questions of our era … barely exist for legal scholarship«, declaring that non-state law was not being researched due to the narrow-mindedness of many legal scholars who refrained from attending to rules and norms not affiliated with state-law and instead devoted their energies solely to exegetical work on legislations. »Such writings and such teachings can barely be considered scientific anymore: they are merely a particularly insistent form of publishing laws«, he wrote. [13]

Several randomly chosen books published in 1914 also confirm that legal scholarship during this pre-war period had dedicated itself to the recurring problems of the subsequent decades and to producing a series of important texts that went on to become significant reference points for a scholarship that animated debates during the entire span of the 20th century: Books such as *Grundzüge der Rechtsphilosophie* by Gustav Radbruch, *Gesetzesauslegung und Interessenjurisprudenz* by Philipp Heck, *Der Wert des Staates und die Bedeutung des Einzelnen* by Carl Schmittt, *Science et technique en droit privé positif, nouvelle contribution à la critique de la méthode juridique*, the first of four volumes by François Geny, or – in Legal History – *Der deutsche Staat des Mittelalters* by Georg von Below, *Deutsche Verfassungsgeschichte* by Fritz Hartung, *Allgemeine Rechtsgeschichte* by Josef Kohler and Leopold Wenger, and *Le droit des gens et les anciens jurisconsultes espagnols* by Ernest Nys were all published in 1914.

These books may no longer regularly feature on our syllabus or reading lists, and many passages from these works might make today's readers smile or shake their heads; some statements might even cause outrage. For example, in the preface to his book on the medieval state, von Below wrote that his investigations would provide proof for the ›state-like character‹ of the German medieval constitution [14] and Josef Kohler affirmed that »primitive peoples« were not necessarily doomed: Adopting the European culture would help them escape their destiny of a »merely vegetative existence«. [15] Notwithstanding these dreadful biases, we can see that fundamental questions about the state, about the concept of law, reflections about its universality and the search for an understanding of law in other societies animated this scholarship. Today, we are still – or again – asking many of the questions raised in these works from a century ago and rediscovering the relevance of what had been thought and said before.

Thus, not surprisingly, the year 1914 also saw the beginnings of sub-disciplines and scholarly projects that have since grown in stature and are established today: [16] Ehrlich's *Grundlegung der Rechtssoziologie* became the foundational work for the Sociology of Law in Germany, [17] and in the same year, 1914, the first issue of the journal *Arbeitsrecht* appeared, a scholarly platform for the emerging discipline of Labor Law, not least with important contributions by Hugo Sinzheimer from Frankfurt. [18] For Legal History, 1914 was the year when the first volume of *Deutsches Rechtswörterbuch*, an encyclopedic project from the late 19th century, was published. 90,000 new entries have since been added. With the projected finish-

11 In German, some authors wrote about the „planetarische[n] Einstellung des Staatensystems«, Schmidt (1924) 164.

12 It seemed »nur eine unselbständige Episode einer schon ein halbes Jahrhundert zurückreichenden allmählichen inneren und äußeren Umgestaltung des Staatensystems«, Schmidt (1924) 175.

13 In German: »Die bedeutsamsten juristischen Fragen unserer Zeit […] sind für die Rechtslehre kaum vorhanden, gewiß nur deswegen, weil sie wohl im Rechtsleben, nicht aber in der Rechtspflege eine große Rolle spielen«; »Eine solche Literatur und ein solcher Unterricht kann kaum noch als wissenschaftlich bezeichnet werden: sie sind eigentlich nur eine besonders eindringliche Form der Publikation der Gesetze«, Ehrlich (1989) 19, 28.

14 Below (1914), preface V.

15 Such as the »Maoris auf Neuseeland, welche nicht nur europäisches Wesen angenommen haben, sondern auch in europäischer Weise an der Kultur arbeiten. Soweit sie dies nicht vermögen, werden sie allerdings nur ein vegetatives Dasein führen können […]«, Kohler in Kohler / Wenger (1914) 47.

16 On the emergence of subfields, particularly around the time of WWI, cf. Stolleis (2011a).

17 Röhl / Machura (2013); Antonov (2013).

18 Kubo (1995); Blanke (2005).

ing date of 2035, this 19th century scholarly endeavor has stretched well into the 21st century. Not so much the big picture, but select segments of it, display traits that still connect the present to the Wilhelminian era – an era that from today's perspective seems alien and remote.

1.3 Understanding Continuities

How to explain these apparent stabilities in legal scholarship spanning two World Wars and at least six constitutional systems? [19] – One might point to the fact that the 20th century debates in law continued to reference the same texts stemming from late 19th century, such as BGB, HGB, StGB, and the corresponding procedural laws. Even today, literary *genres*, law courses at universities and other modes of knowledge creation are organized around their logics. [20] To some degree, the stability in the field of history can also be attributed to the onerous, time-consuming source-based research projects. Yet another reason may lie in the importance of ›tradition‹ for Western legal thought, with its characteristic authority-based method. Finally, and perhaps surprisingly, even the tragic adaptability of jurists and the law to changing contexts, tasks and political winds might have contributed to the stability of the legal system; because at different moments in the 20th century, especially in the 1930s and 1940s, many jurists set out to ›rethink‹ legal concepts, but when the rethinking failed, they simply returned to earlier ideas. [21] Thus, ›Weimar‹, and the legal system connected with its constitution, continued to serve as important reference points for post-WW2 legal scholarship, spanning large segments of the 20th century.

But above all, these stabilities reveal something that research on the history of knowledge production and the Sociology of Science has clearly depicted in recent decades, namely that knowledge creation is an inherently communicative process, embedded in historically and socially conditioned epistemic cultures, and that, as a result, knowledge creation is a long-cycle phenomenon. Many practices that remain unaccounted for persistently shape it, as do institutions that manifest social processes. Together, they formulate scholarly problems, questions, and approaches. These practices and institutions, to a great degree, also shape the results. If conditions impacting the production of knowledge remained stable, so would the resultant scholarship. By contrast, if the modality of knowledge production changed, the knowledge resultantly produced would be equally affected. [22]

What does this mean for analyzing our discipline in terms of its traditions and perspectives? – A lot, I believe, if we paid close attention to how institutions remain stable and how they transform. And if we remained aware of the potency of the conditions of knowledge production in their ability to shape the results of research: by sheer force of habit, or owing to the resilience of the corporatism that came to mark German academic system during 19th and 20th century, or due to its oligarchical structure. And if we also added to that the stability of the structural reference points for legal scholarship, its various discursive coordinates, and the scientific approaches associated with them, then we can see that the evolution of a discipline such as Legal History depended on diverse contingent circumstances that generated both stability and transformation. Thus, looking back, we are in a far better position to understand why our discipline is the way it is today. We might even be able to draw some conclusions from the transformations over a span of the past hundred years. We may not be able to predict the future, but we certainly can gain clarity on our options. [23]

19 Bernd Rüthers mentioned that Germany had been subject to six different constitutions during the course of the short 20th century – the Wilhelminian era was followed by the Weimar Republic, the National Socialist state, the occupying powers, Federal Republic of Germany (West), the GDR, a strongly Europeanized Federal Republic of Germany. On that and on the regime changes as reflective of the concurrent crises in law and among legal professionals, see Rüthers (2011). For a long-term perspective on 20th century history of the university, see Grüttner et al. (2010), in particular the introduction.

20 Particularly evident in the practice of ›Kommentarliteratur‹, cf. Jansen (2014); on the changes due to Europeanization and globalization Callies (2014).

21 See on this, esp. concerning Carl Schmitt's call for rethinking the law, Rüthers (2011) 74.

22 For an overview see the contribution of Jürgen Renn in this issue of Rg. See also Weingart (2003), Stichweh (2003), Nowotny / Scott (2001); Renn / Hyman (2012); Wendt / Renn (2012).

23 See on these aspects the recent outline by Stichweh (2014).

2 Legal History in the *Bonner Republik*

Questions abound: What were the conditioning factors and the institutional context for conducting research under the rubric of Legal History in Germany? How did these frameworks change? What implications do these changes have for the course Legal History has taken in Germany? These questions will be revisited during my brief review of the *Bonner Republik*, mainly to account for the changed framework conditions for Legal History in Germany in the past quarter century, since the inauguration of the *Berliner Republik* (Part 3). Rather than deliver a comprehensive overview on the history of our discipline, I draw on past research and bibliography[24] to present the salient features of the institutional framework that influenced legal historical scholarship in the postwar period, right until 1989.

The first observation that has to be made is the known but still remarkable fact that in Germany since the later part of the 19th century – a foundational period for the modern university system that also shaped legal scholarship – legal scholarship was essentially identical to legal *historical* scholarship. Owing to the considerable influence of the German Historical School, the so-called historical method seemed to be the only acceptable scientific approach to law. This had changed in early 20th century, not least owing to the major achievements of this historical legal scholarship that gave birth to the twin tools of Juridical Modernity: Codifications and Constitutions. However, during early 20th century, Legal History as a discipline still harbored many traces of this formative period, to the extent that even in the second half of 20th century, legal historians from Germany and other German-speaking countries, like Austria and parts of Switzerland, continued to organize themselves as in the 19th century, with the three sub-disciplines that had emerged from Historical School as their structuring principle: *Romanistik*, *Kanonistik, Germanistik*. These classifications played a central role even in how university chairs and institutes came to be designated, and the fact that the three branches of the journal of the Savigny Foundation, the most traditional Legal History journal in Germany, kept on with this division shows the structural stability of this 19th century imprint. Originally derived from the ideological conflicts of the 19th century, this distinction continued to impact the allocation of material and symbolic resources among German legal historians well until the second half of the 20th century – although at least by then most legal historians had become aware that this division was outdated from the historiographical point of view.

Structuring our review from this fundamental organizational principle of legal historical scholarship, we can see that the first of the three, *Romanistik*, was uncontestedly the most established field of legal historical research within 19th century legal scholarship and had succeeded in maintaining its strong position even after WW2 – despite its difficult situation and complex entanglement with National Socialism. In Germany, as in many countries outside of the German speaking areas, especially in Italy, Roman Law and its later history kept on being central to legal education and were considered a unique treasure of the European culture. The study of Roman law and its exegesis were still deemed important for cultivating the art and science of legal reasoning, and even after WW2, German researchers maintained their strong position in this field along with their Italian and French counterparts, not least due to the intense work undertaken by German scholars since Savigny's days, which over the course of time had generated indispensable tools for reconstructing the complex history of this millenary tradition. Thus, there was a strong strand of legal scholarship on Roman Law and its history well established within the Law Departments, and highly respected internationally.

In a sense, the new field *Privatrechtsgeschichte der Neuzeit*, History of Private Law in the Modern Period, which had its intellectual origins in the 30s, and was a strategic invention of National Socialist Germany, added an important new dimension to

24 Cf. extensively Ogorek (1994). Summaries of the history of legal historiography in this period with further references also in Caroni / Dilcher (1998); Willoweit (2007a); Stolleis (2012a); Senn (2012); Duve (2012).

this traditional scholarship on Roman law. After WW2, scholars like Helmut Coing and Franz Wieacker came to be regarded as the dominant figures in this field. As a new field of study, ›History of Private Law in the Modern Period‹ made its way into the teaching curricula and succeeded to establish itself at most Law Departments. Since the 1960s, this *Privatrechtsgeschichte der Neuzeit* has profited from the Europeanization of law, and transformed into a *Europäische Rechtsgeschichte*, European Legal History. Owing to these origins, European Legal History was specifically a history of learned private law (*Gelehrtes Recht*) that took the Late Middle Ages and the reception of Roman Law as its starting point and proceeded to study the process of reception up to the era of codifications. Scholars in this field told a story of an increasing scientification (*Verwissenschaftlichung*), a history of learned law as it was taught and conceptualized by legal scholars in the Middle Ages and in the Early Modern period. They focused on the subsequent transformations this law underwent during 19th century codifications and succeeded in depicting these transformations as gradual differentiation within a common tradition. Countering the nationalist narrative of 19th century legal historical scholarship, they thus contributed their share to harmonization efforts in the context of European political and legal integration, starting in the 50s. As nearly all of the legal historians also taught Civil Law at the university and dedicated at least some time to work on the so-called ›dogmatics‹ of Civil Law, sometimes drawing on their own historical and comparative legal scholarship, the image they drew of the legal historical past of Germany or Europe was nearly exclusively drawn from the perspective of *ius civile*. And as one of the hopes of this European-turn was to identify and re-establish common features of European Legal History, as a legal historical reflection on the ongoing process of European integration, most texts of this period are not free from a teleological orientation. European Legal history seemed to have nearly necessarily led to the state centered legal system we had been developing in 19th and 20th century, and it seemed a logical step to work on the extension of this nation-state-based model on a European level. Habitual Eurocentrism, ontological beliefs, some instruments taken from Comparative Law like the presumption of similarity helped to create and maintain this narrative.

As such, the History of Private Law in the Modern Period as well as its sister, European Legal History, significantly advanced the study of the history of law and legal scholarship, and they were able to institutionalize their programs through professorships, publications, and teaching materials; the foundation of our Max Planck Institute for European Legal History is part of this success story. Although European Legal History remained anchored in the intellectual traditions of the interwar period, it met with considerable interest in the postwar period, when integration, European unification and the harmonization of legal systems in Europe became the guiding political imperatives. Outlining a shared (legal) past legitimized such endeavors. It was not least this Europeanization that helped to save university positions reserved for Roman Law and Legal History. It connected scholarly debates on Civil Law with historical and comparative methods. Thus, Legal History had transnationalized long before other branches of history did. In a way, until the 1980s, the close connection between Private Law, legal historical thought and Comparative Law, had not completely vanished. On the contrary, the new codifications in Eastern Europe in the 1990s and the new dynamics of European integration in this period enhanced studies on the common foundations of European legal culture.

The second field in this triad, the *Kanonistik*, the history of Canon Law, had always been a much smaller discipline, but no less international in scope. Again, German scholars such as Emil Friedberg and Johann Friedrich v. Schulte from the 19th and Stephan Kuttner from the 20th century were the leading figures for large parts of the century. Many of the authoritative works, central editions and bibliographies on the history of Canon Law date from late 19th and early 20th century. Interestingly, some of the most important works were authored by Protestant scholars and others who stood their ground against the Roman Catholic Church. In parallel to what had happened in the field of Roman Law, scholars of the history of Canon Law had for long focused on law as it had been conceptualized and taught by legal scholars, and put in practice by the Popes. This convergence between the two fields of study, Roman Law and Canon Law, gave rise to disputes about the historical primacy of the two central parts of *ius commune*, *ius civile* or *ius canonicum*, raising questions about who invented which legal institution. Other

fields of normative thought and production, like synods, moral theology etc. were less studied or even considered ›a-juridical‹, becoming the prerogative of Church historians or historians of Theology. Yet, in contrast to the research on the history of Roman law and its transformation in the medieval and modern times, with the new field of History of Private Law in the Modern Period as a new discipline that stretched Roman legal historian's expertise into Modernity, research on the history of Canon law somehow never really escaped the bounds of medieval legal history. Adherence to questionable paradigms like ›originality‹ and ›innovation‹ as well as to a concept of law inherited from 19th century positivism had largely marginalized early modern Canon Law within the discipline's field. 19th century codification efforts and 20th century developments have hardly been studied until recently. One reason for this may have to do with the group of scholars dedicated to this field, and the significance of the Institute of Medieval Canon Law (later Stephan Kuttner Institute) founded in the US in the 1950s by the German emigree Stephan Kuttner which was later transferred to Munich and recently returned to the US. Like Stephan Kuttner, who pioneered the history of Canon Law, the Institute focused on bringing out editions of medieval sources, especially those close to the *Decretum Gratiani*, often seen as the pivotal moment in the history of Canon Law. As a result, many historians of Canon Law from all over the world spent considerable energies editing and interpreting texts from the decades before and after 1140. The scope of these editorial projects as well as the high level of specialization required to carry them out in a certain way endangered the institutional basis of Canon Law in the Departments of Law, Theology, or even Canon Law. Already in the later 1980s, with few notable exceptions, more and more scholarship on the history of Canon Law was produced in History Departments. With the near disappearance of research on the history of Canon Law from Law Departments, scholarly work on central issues like the integration of different modes of normativity, the relationship between ›law‹ and ›religion‹, but also the historical importance of religious institutions for the formation of the legal system in the West had lost its traditional institutional framework.

Important changes could be observed after 1945 also in the field of *Germanistik*. In the aftermath of the war, following the use and abuse of this concept by its National Socialist proponents, the study of Germanic traditions proved to be a difficult undertaking, which was almost impossible to sustain. In the postwar era, legal historians in this field began to develop nuanced interest in a kind of reception that hinted at a renaissance of Savigny's methods. Research on medieval ideas of what counted as law and sources of law became central and were connected to reflections on the problems of methodology. Scholars that did not focus on the Middle Ages in their research used the framework developed by Franz Wieacker in his groundbreaking work on the history of private law in Europe to inquire into the private law doctrine, the history of argumentation and interpretation in legal thought, and to study the foundations of the BGB, the German civil code that came into force in 1900. In the 1970s and 1980s, scholars began to inquire into the law of industrial societies and the history of labor and commercial law. Social history provided an important stimulus to Legal History. It seemed as if *Germanistik* as such had almost vanished. Research on the classical subject matters was reorganized in chronological order to form a part of Medieval Legal History, or History of the Early Modern or Modern Era.

Towards the end of this period, in the 1970s and 1980s, we can observe the emergence of new research fields, like the history of Criminal Law, and criminality, or of Public Law and its science. Legal historians became increasingly open to historical research and to the social scientific approaches becoming popular in historiography in the 1970s and 1980s. For example, up until then, scholars of the history of Criminal Law had approached their questions in a manner similar to scholars of other branches of juridical knowledge: as a history of learned criminal law. Now, closer cooperation with scholars of the history of crime and criminality encouraged legal historians to integrate archival sources from the judiciary and other legal institutions into their work. Such exchanges also involved inquiring into the societal function of penal law, into processes of social disciplining and law enforcement. New theoretical approaches to law and society had to be taken into account. Slowly, the hegemony of Savigny's ideas about law seemed to fade. Significant projects, some still ongoing today, based on the High Court archives began at that time. Like Social History, specific branches of Legal History increasingly took advantage of the electronic datasets.

Questions such as the law enforcement and social disciplining were also discussed in the emerging field of History of Public Law. Moreover, the prospect of confronting Germany's National Socialist past, and the scholarly thought that had forged and accompanied it, triggered the need to understand the state in its fascinating and horrible functionality. In a certain parallel, the study of the German legal scholarship during the National Socialist period intensified in the 1970s and 1980s. Contemporary History of Law (*Juristische Zeitgeschichte*) emerged as a new field of study. In fact, new methods, theoretical debates, and new institutional constellations entered into the orbit of what remained of the traditional *Germanistik*.

In 1986, the *Rechtshistorikertag*, the annual conference of legal historians of German speaking countries held in Frankfurt am Main, both emblematized and catalyzed many of these changes. An important innovation was to depart from the established divisions of Roman, Germanic and Canon Law sections. Intense debates on method, function and subject matters of Legal History impacted the discipline. Hard-hitting discussions about methodology in Legal History were carried out. However, the intellectual and institutional context for innovation had lagged behind. With the emergence of new fields of study, such as Environmental Law, Media Law, European Law, and owing not least to the growing number of students and the market-driven logics within higher education policies, the pressure on the foundational subject (*Grundlagenfächer*) at law departments had intensified. What is more, whereas in the first decades following WW2, academic elites generally did not question the historical ways of thinking, after 1968, the ideological foundations and functions of historical approaches came to be increasingly challenged. Soon after the 1980s, historical knowledge was no longer a part of the academic *habitus* of an average law professor anymore – a decisive moment in day-to-day decisions about allocation of resources within law departments. Legal historians were increasingly selected on the basis of their research on actual legal dogmatics, generally in the field of Civil Law. All this made life more difficult for legal historians.

One last observation must be added: Most research in this period was local, national, and sometimes – in as much as it focused on other legal orders – comparative. Although European Legal History had set out to overcome national boundaries, it did not fully depart from its national reference points. Many considered it a very German exercise, due to the lasting imprint of the concept of law developed within the framework of the Historical School and its vehement focus on learned law and the development of a legal system in the strictest sense. Legal historians often preserved a ›Eurocentric‹ perspective in their assessment of the world. They proudly traced European influences in non-European contexts, stating a ›deficient reception‹ to assert the superior quality of the European legal system. Obviously, even if no one would have expressed his ideas in the drastic way Josef Kohler did in 1914, many would still have shared his underlying vision, be that due to mere habitus, the traditional belief in the singularity of Europe, or in adherence to the modernization theories of the 1970s. In a way, this Eurocentric perspective was affirmed by non-European (especially Asian) legal scholars and practitioners, who reformulated the questions, approaches and concepts they had learned in the study of European Legal History in Germany, Austria, or Switzerland to modernize their own institutions, for instance, to restructure Japanese legal history based on concepts developed within German legal history.

Briefly put, legal historians in the 1970s and 1980s witnessed what several analyses of the history of the *Bonner Republik* demonstrate,[25] namely an increased intellectual differentiation. Legal historians broached many new themes and questions, developed new perspectives and were increasingly

25 See Wirsching / Therborn (2011); Wirsching (2012), esp. 19 ff. For historiography, see Raphael (2010) 215 ff.; for law see the articles in Simon (1994) as well as Willoweit (2007b). For accounts addressing »destabilization« in the 1960s and 1970s and a restructuring process in the 1980s see also Prinz / Weingart (1990).

open to collaboration. Although these changes also had institutional implications, such as the reform of the *Rechtshistorikertag* or the foundation of new journals (*Zeitschrift für Neuere Rechtsgeschichte*, *Rechtshistorisches Journal*), scholarly production in Legal History remained nonetheless dependent on stable organizational structures: chairs in Legal History remained dedicated to an area of modern law, mainly Civil Law, and continued to be divided into *Romanistik* and *Germanistik*, or History of Private Law in the Modern Period. In addition, the core content of teaching and examinations, the content of what was considered basic knowledge in Legal History, remained for most part stable.

There are other stabilities: The emergence of European Legal History as a discipline did not transform the agenda, it merely expanded a very German agenda on Europe. The rising state and its law were still the main reference points, and Legal History continued telling the story of the scientification of law, still the area in which scholarly reputation could be built and gained. The core textbooks and encyclopedias also did not mirror the mentioned differentiation: Helmut Coing published two volumes on European Legal History in the 1980s and thus prolonged the influence of a program that in essence had stemmed from the postwar period, well into the 1990s. And despite much unease, nobody was able to produce an influential work to counter the textbook that Franz Wieacker had written with such authority, elegance, and ambiguity.[26] Its translation into at least ten other languages (into English in 1995), or the publication of the new edition of the first edition of the Spanish translation in 2000, again prolonged its impact well into present times.

Even though the 1960s and the early 1970s were years of growth, both intellectually and institutionally, in that numerous publications appeared in many subfields of legal scholarship[27] and many fields experienced substantial progress, no new master narrative could establish itself prominently and no new consensus on method and approaches was achieved. By contrast, by the late 1980s, grand narratives had mostly turned out to be too grand.[28] Some scholars reacted calmly to this, some others became cynical, but most simply continued working or even resorted to the classical methods of the 19th century.[29] »For most part«, one observer stated, »the discipline has come to terms with the fact that the idea of a common approach has become obsolete […].«[30]

3 Legal History in the *Berliner Republik*

In this somehow diffuse situation, a quarter century ago, the Berlin Wall fell and the so-called ›Republic of Berlin‹, the *Berliner Republik*, was inaugurated.[31] Obviously this was a transcendental moment for German and European contemporary history. It might have been less decisive for the non-European world, but it seems undeniable that after 1989 longer-term historical shifts, like globalization, digitization or the economization of our culture and societies, became ever more pronounced. These general trends acquired greater relevance in everyday life and their impact on law, academia, and even on scholarship within Legal History, became undeniable, as a survey of the legal historical research (3.1) and some responses within the discipline show (3.2).

3.1 The Changing Context of Legal History in Germany

Instead of offering an exhaustive overview of all the fields where these transformations gained influence, I concentrate on major changes in some fields that significantly impact the conditions of the production of knowledge. They have triggered transformations in German legal scholarship in general (3.1.1), in the way neighboring disciplines regard ›law‹ and its history as an object of research

26 See Rückert (1995); now very critically Winkler (2014).

27 See especially Willoweit (2007b) as well as some contributions in Willoweit (2007a).

28 Rückert (2008).

29 For a wide range of positions see the short and substantive review by Röhl (1994) and the contributions in Rechtshistorisches Journal (1985); Rechtsgeschichte (2003); Rechtsgeschichte (2004); Zimmermann (1998).

30 They had »wohl damit arrangiert, daß die Vorstellung von einer einheitlichen Methode obsolet geworden ist […]«, Ogorek (1994) 99.

31 On the Berliner Republik see Görtemaker (2009), esp. 7 ff.; for the importance of this period as a turning point and turning points in general contemporary history see Sabrow (2012).

(3.1.2), in the German higher education and research system (3.1.3) and in the international context of legal historical research (3.1.4). My review also includes some deliberations on the impact of the so called ›Digital Revolution‹ on our field of study (3.1.5).

3.1.1 Legal Scholarship in Germany

Looking at the most immediate disciplinary context for research in Legal History, an interesting development can be noted in the significance attributed to the said foundational subjects (*Grundlagenfächer*), like Legal Theory, Legal History, and Sociology of Law, and to their institutional situation. On the one hand, previous efforts to replace these sub-disciplines did not altogether cease. The integration of new fields of study in Law Departments, the growing number of students, reforms in legal education that resulted in considerably higher workload for law professors, were not favorable to what some already considered a luxurious and thus unnecessary intellectual preoccupation. Thus, the number of chairs in Legal History has significantly reduced. The institutional presence of Legal Philosophy, Legal Theory or Sociology of Law at Law Departments had also shrunk. In addition, during these years, the strong bond between the study of Private Law and Legal History seemed to weaken – despite important initiatives, such as the *Historisch-kritischer Kommentar zum BGB*, intended to facilitate the adoption of an historical and comparative approach to Private Law.[32] In short, the institutional backing of Legal History has become precarious.

At the same time, an interesting countertrend has emerged. There seems to be growing interest in introducing historical approaches in fields that previously were only marginally affiliated with Legal History. And this is especially true in the scholarship on Public Law. For the past two decades, this field has inspired many scholarly debates on foundational questions, such as the very nature of legal scholarship,[33] but also on the concept of law, legal evolution, the state and its changing role, on globalization and its impact on regulation and governance etc. It would not be an overstatement to say that whereas the majority of important debates on method and legal theory in the *Bonner Republik* had been carried out with the very strong participation and leadership of Private Law scholars, in the *Berliner Republik*, scholars of Public Law have assumed a higher profile in the domain of theory and method. As a consequence, legal scholars in different fields of Public Law no longer limit their historical considerations to introductory sections, and no longer ascribe to it, as has been common for quite some time, merely an ornamental value. Instead, historical approaches are being regarded as valuable and necessary tools for research – be they from Public Law more generally,[34] or from European[35] or International Law.[36] The mayor reason for this might be that those scholars dedicated to research on the state, its law making, governance and the emergence of new regulatory frameworks at the moment have to confront fundamental questions more forcefully and thus are facing transformations that can only be understood from a long-term perspective.[37] Another reason, closely linked with this, might be the pronounced interest in the theory of evolution, its applicability to law, and the mayor sensibility to cultural studies of law, which is more clearly visible in Public Law.[38] The growing impact of Niklas Luhmann's theory of systems since the late 1980s seems especially important in this context, because of its genuine interest in long-term observation. At the same time, several legal theories that dominated German scholarship in the 1960s and 1970s that were historically sterile, have,

32 See on this project, designed by Joachim Rückert, Mathias Schmoeckel and Reinhard Zimmermann, the introduction in the first volume of the HKK as well as the comment on this project by Vec (2011a). For a balanced account of the German tradition in this field in English see Du Plessis (2010).

33 See for example the contributions in Engel / Schön (2007); Jestaedt / Lepsius (2008).

34 See the survey by Wahl (2006); Funke / Lüdemann (2009).

35 See for example Schorkopf (2014).

36 See for example Fassbender / Peters (2012).

37 For an overview of the current situation from the perspective of German Public Law see Vosskuhle / Bumke (2013).

38 Vesting (2007); Haltern (2012).

like analytical philosophy or legal-philosophical positivism, steadily been losing ground.[39] In addition to this, the new fields of legal historical research that had started to emerge in the *Bonner Republik*, like the History of Crime and Criminal Law, History of Public Law, History of International Law, showed the potential of an intensifying dialogue.

Another observation, related to the one already mentioned, is that the object of legal scholarship – the *modus* of normativity we label as ›law‹ – itself seems to have experienced some modifications widely accepted within legal scholarship. The epoch of ›juridical nationalism‹, when legal scholars were mostly preoccupied with national laws, virtually ended in the 1990s' once jurists began responding to the challenge of reflecting on the normative order of a world that is not only dominated by regional processes of harmonization and integration, like Europe, but one that also witnesses the formation of (new) normative orders on global scale.[40] This is more significant than the challenge to integrate ›European‹ law into the national structures of the legal system and the transformation these systems underwent as a consequence.[41] Thus, especially since the dawn of the new millennium, the problems related to the formation of normative orders and systems of decision-making in a »world society« have moved from the margins to core areas within legal scholarship.[42] One reason for this can be seen in the dynamic growth of ›Transnational Law‹, originally stemming from the 1950s within the context of the US economic law.[43] The terrain of this Transnational Law continues to expand along with the dynamic changes in the world of law through globalization. Many jurists have felt that legal scholarship in Germany had to respond to this, a point I will revisit in section 4.2.2, because it offers a rich field of reflection for Legal History.[44]

This transnationalization of law challenges legal scholarship to reflect on the foundations of law and other forms of normativity. For example, scholars concerned with the problem of legitimacy of global orders today discuss whether and how global democracy might work,[45] what an intercultural idea of justice might look like,[46] whether and how one might synchronize Western concepts like the rule of law and other ideas, such as »harmony«,[47] and whether a »legal meta-language« exists, whereby we can effectively communicate normativity despite cultural differences.[48] Scholars are trying to analyze the emerging new world-order, asking whether it can be understood within the scope of the traditional doctrine that emerged from state-paradigms.[49] Many such debates rely on historical accounts, be that because they adopt an evolutionary perspective or because they attempt to track a historical process of »sedimentation,«[50] or because they inquire prospectively into the »trickle-down effect of international norms in domestic legal orders«.[51] In similar vein, discussions about the emergence of isomorphic social orders, by locally imitating the global models, are also at least partly based on research in Legal History.[52] These authors thus discuss normativity in terms of differentiation, hybridization, reproduction, translation, or amalgamation, to name a few modalities used to analyze the evolution of law over time.[53] Similarly, debates about global governance and governance in regions with weak and incomplete statehood greatly rely on historical

39 For a survey of the situation until the 1980s see Hilgendorf (2005); for the 1990s Hilgendorf (2008).
40 For a first orientation see Sieber (2010); Kadelbach / Günther (2011); Grimm (2012); Berman (2012) as well as the articles in Schwarze (2008) and Jansen / Michaels (2008).
41 See on this the profound survey of Mangold (2011).
42 See Bogdandy / Venzke (2014); Darian-Smith (2013).
43 On Transnational Law see the comprehensive panorama in Zumbansen (2012); Cotterrell (2012); Duve (2014a). Also the articles in the special edition of the German Law Journal (2009).
44 See on the ›internationalization‹ of legal scholarship in Germany Jestaedt (2012); Stürner (2012); Vogel (2012). Interesting contributions also in Hof / Olenhusen (2012); Chiesa / De Luca (2009); Leibfried / Möllers (2006).
45 Kriesi (2010).
46 Sen (2009).
47 Mindus (2012).
48 Günther (2001); Günther (2008).
49 See on this e. g. Glenn (2013) and the review on Glenn by Schuppert in this issue.
50 Tuori (2002).
51 Cassese (2012) 665 f.
52 Meyer (2005).
53 See on this Duve (2014c).

expertise,[54] and important theorists of globalization, such as Saskia Sassen, argue that a historical perspective is the key to understanding the globalizing processes.[55] As the Finnish legal theorist, Kaarlo Tuori, recently put it, law and legal scholarship now appear to be »thoroughly historical enterprises«.[56] In addition to the relevance and the multiple benefits of understanding the formation of normative orders from a diachronic perspective, and regardless of how world society is imagined, many scholars emphasize that the different normative orders present in world society nowadays can be integrated only by reflecting on the path-dependencies, thus from a historical perspective.[57] It is interesting to note, in this context, that some of the scholars dedicated to better understanding of these emerging normative orders on a global scale are interested in the comparison between pre- and postmodern legal orders.[58] Not least due to European colonialism, this dialogue between European and other areas' normative orders also needs to be accompanied by a historical reflection on the past, and its impact on power structures still shaping the present.[59] To sum up, there is growing awareness of the historicity of our normative orders, of the insights that can be gained from historical perspectives and the necessity of framing the growing intercultural dialogue through historical reflection – and thus there is a felt need also for legal historical research. As most participants in these debates are not legal historians and have to draw on research carried out by others, legal historians must respond to this exigency.

In light of these fundamental transformations in the field of law, it should not come as a surprise that in July 2012, the German Council for the Humanities and Sciences (*Wissenschaftsrat*) recommended that legal scholars in Germany further internationalize and strengthen the foundational subjects (*Grundlagenfächer*), claiming a further integration of Sociology of Law, Legal Theory and Legal History with the so-called ›dogmatics‹[60] – a challenging task both intellectually and institutionally.

3.1.2 Neighboring Disciplines

There seems to be a growing interest for legal historical research also outside the field of legal scholarship. During the last 25 years, some neighboring disciplines have also undergone changes that have powerful implications for how they view Legal History. Again, I will limit myself to key points.

Firstly, it seems to me that historians are increasingly interested in questions and problems connected with law.[61] The reasons for that are varied: the linguistic turn in the 1980s and 1990s, a renewed history of ideas and concepts, and a growing interest in institutional practices and their impact on society have heightened historians' sensitivity to the effect law might have on social life. Due to an increase in the said interactions since the 1970s, ›General‹ History and Legal History are discovering more points of convergence within their respective fields of study as well as in theories and methods. Recently, the emergence of the history of knowledge has further contributed to the blurring of disciplinary boundaries.[62] By contrast, traditional social history, which focused on structures and once regarded law as a mere epiphenomenon, has been in open retreat since the 1990s. Not few Social Historians seem to have changed their attitude to the importance of considering law, discovering its significance as a relatively autonomous societal force. A remark by the recently deceased German social historian Hans Ulrich Wehler in the conclusion to his monumental *Deutsche Gesellschaftsgeschichte* is emblematic of these developments. Looking back on his work in 2008, he notes that he distinctly underestimated the significance of law.[63]

Apart from this opening in the field of History, there seems to be a growing interest in law and its history also from scholars in other parts of the humanities, cultural studies and social sciences. Some legal scholars have reciprocated the disciplinary interest and are decidedly open and receptive to the discourses of these disciplines.[64] Again, if

54 See e. g. Conrad / Stange (2011).
55 Sassen (2006).
56 Tuori (2011) 44 f.
57 See e. g. the explanations in Teubner (2012) 225 ff., esp. 242 ff. about the intercultural collisions.
58 Stolleis (2008); Duve (2011).
59 See only as an example Santos (2010); on the necessity of a historical dimension in transnational dialogues Assmann (2013) 142 ff.
60 Wissenschaftsrat (2012).
61 Although it might still be a difficult relation sometimes, see Hedinger / Siemens (2012); Siemens (2012).
62 For an overview see Sarasin (2011).
63 Wehler (2008) 421.
64 For an overview see Van Klink / Taekema (2011).

once law had been regarded simply as a dependent variable, or in the service of formulating imperial and hegemonic discourses, more recently, scholars have expressed greater interest in the »relative autonomy« of law and of other normative spheres and enquired about their place in the societal action.[65] For example, social scientists such as Bruno Latour have brought to bear ethnographic methods on the study of law in ways that would have been unthinkable in the heyday of structuralism in the 1970s.[66] In political science, law has become an important subject for research on governance – a problem that also preoccupies legal scholars. Anthropologists who can draw on a long tradition of studying distinct aspects of law, but did not dedicate to law itself, are increasingly interested in law and its history. »There is much to be gained by delving into legal history«, legal anthropologist Fernanda Pirie wrote recently.[67] And in the past few years, scholars of the so-called ›General Jurisprudence‹ – in an attempt to conceive of some sort of legal doctrine for a world society – have engaged several approaches to perform a transcultural analysis of the modes of normativity or to adopt multiple modes of conflict resolution that anthropologists have developed, combining this with historical reflections on the underlying reasons for processes of differentiation and convergence.[68]

In short, interest in law, and in normativity more broadly speaking, has been on the rise in several disciplines not traditionally linked to Legal History. Still, this growing interest in the results of legal historical scholarship is not without its risks. We have sought to internationalize dialogues and open up disciplinary discourses, which means that scholars from different disciplines and areas increasingly draw on theories and methods that may no longer be rooted in a single discipline but instead rapidly spread across areas and disciplines. Thus, sometimes, scholarly communication happens not so much along disciplinary lines, or even across disciplines, but, rather, it follows fashion trends that are often only superficially applied to the exigencies within one's own field. In addition to this, we are spending more and more time with interdisciplinary dialogues, time that we lack for our disciplinary work. While these interdisciplinary exchanges can be exciting, there are potential pitfalls along the way. For even though canons and traditions foster disciplinary isolation and require persistent revision, building them is vital for the continued existence of scientific disciplines. Eroding away disciplinary boundaries might be inspiring, but that can have negative consequences for how the system through which research is being organized functions: established ways of selecting relevant problems, the formation and transformation of disciplinary canons of knowledge and theories cannot function without specific disciplinary frameworks. The same applies to mechanisms of socialization, to career structures, systems of quality control, and ways of attributing reputation. They are all necessary for a discipline to function and they derive as much from disciplinary traditions as from national structures. How can we make them work in a world of increasingly porous disciplinary boundaries, the complexity of which the phenomenon of transnational scholarship further compounds? How can we assure their functioning in a world where national structures are being weakened, giving way to transnational scholarly communities? – Obviously, new and suitable institutional frameworks are needed. Some of the typical risks of ›globalization‹, such as the Anglicization of discourses, the loss of traditions and thus of analytical plurality, and in the end also a perceived lack of depth, rootedness and intensity of knowledge, is threatening even a small scholarly discipline as Legal History.

3.1.3 German Higher Education and Research System

These observations inevitably lead to a third field of observation, namely the changes in the German higher education and research system. Here, the *Berliner Republik* introduced a distinct set of structural reforms on resource allocation within the system. A lot of what has been said about the porosity of disciplinary boundaries and the transnationalization of discourses has its roots

65 On theology see the essays in Welker / Etzelmüller (2013).

66 Latour (2010).

67 Pirie (2013) 15; see also Moore (2001); Benda-Beckmann / Benda-Beckmann (2009); but little in the German-speaking socio-cultural anthropology, Bollig (2013).

68 Twining (2009).

in these reforms that have pressed for internationalization and a greater openness to interdisciplinary research.

Again, I can only highlight some aspects.[69]

Legal scholarship has already begun to feel the consequences of these reforms in rather concrete ways, especially in the field of legal education.[70] Overall, the 1990s and 2000s saw an increase in the number of law students, reforms in the curricula, higher workload and less freedom (and money and social prestige, one might add) for professors as well as a decrease in the duration of the degree program for students.[71] By the way, German reunification did not generate inspiring alternatives, although one might have thought that this could be the case.[72]

One important development is that within Germany's higher education and research system, during the last two decades there has been a distinct shift towards ›Universities of Applied Sciences‹, known in Germany as *Fachhochschulen*. These *Fachhochschulen* are the more practically oriented institutions of higher education that are traditionally not focused on research. According to a report issued by the German Council for the Humanities and Sciences, the number of law professors at these universities has doubled over the past eleven years and the money spent on legal education there has also risen by 45% in the same period, so that today one third of all law professors in Germany teach at a University of Applied Sciences, whereas 8.7% of all students are enrolled there. This development, and the political will that perpetuates and furthers it, pose challenges not least for the foundational subjects. On the one hand, as the number of law graduates at the Universities of Applied Sciences increases, ever fewer jurists will have received a legal education that included at least some perspectives on the fundamental aspects of the legal system, and observations from a non-practical point of view. This is undoubtedly a negative trend, especially if a key function of legal scholarship was to critically observe and reflect upon the legal system. Thus, we will have less and less critical observers, and more practitioners. On the other hand, the internal differentiation within legal education that these developments encourage also offers big opportunities to strengthen the foundational subjects, internationalize research and teaching, and to narrow the gap between research and teaching – provided, of course, that universities vigorously use this opportunity to differentiate themselves from the Universities of Applied Sciences. It could also be an opportunity to strengthen the academic character of legal education at universities which has been severely affected by the reforms introduced during the last decades. Thus, universities must not respond by dumbing down the curricula, to be competitive. On the contrary, they must target growth in higher non-applicative post-graduate education and in lesser applicative fields for teaching and research for which the Universities of Applied Sciences lack the intellectual and institutional resources.

Another – and even more important – change during the *Berliner Republik* with far-reaching implications was that ever more resources within the higher education and research system began to be allocated on a competitive basis.[73] Overall, this shift has led to tighter budgets for the every-day-work and a significant increase in third party funding. Just between 2000 and 2010, the third party funding per chair at German Law Departments has doubled. It now stands at 34,000 euros per year. As such, it is considerably less than the average third party funding that professors in the humanities and cultural studies have received, which stands at 56,000 euros per year. Moreover, law professors have had less success in raising additional money from the German Research Foundation (DFG). Between 2003 and 2011, the total funding Law Departments were able to attract every year has only grown by 18%, from 5.9 to 7 million euros.[74] This discrepancy in the

69 For a summary from the viewpoint of the German Council of Science and Humanities (Wissenschaftsrat) see Wissenschaftsrat (2012); Wissenschaftsrat (2013). Informative are also the observations about the new organizational units in the sciences in the report by the Stifterverband für die deutsche Wissenschaft e.V., Reichart / Winde (2012).

70 The German Council of Science and Humanities gives a summary about the developments in his recommendations: Wissenschaftsrat (2012).

71 For the reform debate in the 2000s see KritV (2007); KritV (2009); Güldemund / Keller (2012) as well as the contributions in Hof / Olenhusen (2012).

72 See Wissenschaftsrat (1991).

73 For an overview on the figures see the report of the German Council of Science and Humanities: Wissenschaftsrat (2013).

74 Wissenschaftsrat (2013) 14–15.

third party funding from the German Research Foundation, and from other sources, points to crucial questions concerning the autonomy of legal scholarship and research and deserves careful thought and analyses in the future.[75] For the moment, however, one observation is more important: Legal History has clearly profited from this shift in resource allocation. For in spite of the loss of chairs dedicated to Legal History at many universities, legal historians are involved in a series of joint research projects with historians that rely on third party funding. In other words, they partake in and benefit from the higher amounts of funding that the scholars in the humanities and cultural studies have been able to attract. Since the neighboring disciplines are increasingly interested in law, these joint research projects have furthered interdisciplinary exchanges and have led to a significant growth in the professionalization of legal historians. Many important research projects could not have been carried out without these new types of project-specific funding. However, the integration of legal historians in such interdisciplinary projects has also endangered their relationship with law – the discipline with which they are institutionally most closely affiliated. Legal historians are now more apt to engage with scholars in other fields rather than with colleagues in their own departments. This development does not further the cause of integrating the foundational subjects, such as Legal History, into other fields of legal research. Moreover, it also threatens the institutional continuity of Legal History in Law Departments; for unlike other disciplines, where interdisciplinarity often fails because scholars are reluctant to pursue different questions, methods, and perspectives, legal historians have the opposite problem: by increasingly working with historians, they are in danger of loosening ties with legal scholarship. Thus, interdisciplinary work might be counterproductive, because it threatens to undermine the conditions of disciplinary existence.[76] It might even result in a loss of interdisciplinarity, if Legal History would disappear within law departments, and vanish within departments of History. Legal History is interdisciplinary by definition, an interdisciplinarity sustained by its institutional integration into the law departments.

Finally, with the internationalization of universities, yet another significant change has occurred within the German academic system, with manifold implications for the study of law. The political will for this development is likely to persist. At one of their conventions, the presidents of German universities proclaimed that the university of the future would be a transnational university.[77] Similarly, the German Council for the Humanities and Sciences has underlined the importance of this policy for universities more generally and has highlighted its particular significance for the study of law.[78] Again, this further ›transnationalization‹ of academia is a shift in research politics that Legal History has to take into account; I will address this point later (4.2.1).

3.1.4 The International Context

This ›transnationalization‹ of academia leads us to another set of transformations relevant to Legal History: the changing international context of legal historical research.

As I have tried to show in my overview of Legal History in Germany, during the years of the *Bonner Republik* up until the 1980s, German legal historians were regarded as leaders in a field that had sprung from the 19th century intellectual movement, the German Historical School, and its aftermath. German scholarship did once shape methods, approaches, and questions on an international level. Indeed, in the late 19th century and throughout much of the 20th century, the German concept of Legal History served as a model in many places across the globe. Many scholars working outside of Germany heavily relied on German scholarship to

75 See also the pointed observations from Fischer-Lescano (2012) but also the articles in KritV (2007) and KritV (2009), esp. Albrecht (2009).

76 On interdisciplinarity see Weingart (2014).

77 See on this the ›International Strategy of the German Rectors' Conference, Resolution by the 4th General Assembly of 18 November 2008‹, published in Hochschulrektorenkonferenz (2012): »Tomorrow's university is a transnational university. This is the theory put forward by the German Rectors' Conference (HRK) as part of its International Strategy. It is based on the conviction that a sustainable and forward-looking university must perceive itself as a creative part of a developing global academic community in every conceivable element of its work, and must act accordingly. Therefore, in all of their activities, universities need to respond to the consequences of globalisation within teaching, learning, and research.«

78 Wissenschaftsrat (2012); Wissenschaftsrat (2013).

formulate the legal histories of their own countries. The questions and approaches developed in the German tradition or within a ›very German‹ tradition of European Legal History were applied to their own legal histories.

Over the last two decades, a variety of factors has radically transformed this situation. Let me just mention a few of them: German stopped being an international language of academic research and publication; Anglo-American law is on the rise on international stage, which means that more scholars are interested in its history; publishing practices have changed substantially; Europe has become a global region next to others – a phenomenon that has had its own historiographical effects. Especially books published in and for the English-speaking world reflect this shift. One example might be *The Oxford International Encyclopedia of Legal History.*[79] Published in print in 2009,[80] the content of this reference work is now part of an information platform called ›Oxford Reference‹ that brings together 2 million digitized entries. While it is no doubt a major source of information for global scholarship, the spread and the coverage of the content are not very encouraging for German legal historians. The entry on Germany covers five columns,[81] while the editors have allotted 130 columns and many subentries to China and the Chinese law.[82] While this apportionment might approximately correspond to the relationship between the populations of the two countries, it does not reflect the former standing of German legal historians, neither our self-perception. Yet, this distribution is the consequence of an editorial decision to describe European Legal History under the entry *Medieval and post-medieval Roman law* and to see this as one among the many other entries, such as *Chinese law*, *English common law*, *Hindu*, *Islamic*, *South Asian*, *African*, *Latin American*, and *United States law*.[83] The same we can see in the structure of the subentries, for example, the entry on *Marriage*. Unlike for the Chinese, Hindu, or ancient Greek law, the reader interested in Marriage law in European tradition is expected to read diverse entries and subentries in order to find some results.[84] Thus, while the catalogue of the Max Planck Institute for European Legal History currently lists 2409 entries tagged as ›*Eherecht*‹, Marriage law, *The Oxford International Encyclopedia of Legal History* has compressed these hundreds of contributions related to the history of marriage law on the European continent into a few subentries that are placed between the big blocks relating to *Chinese, Hindu*, and *Islamic Law*.

To be sure, the importance of such a reference work must not be overstated. Projects such as these are guided by commercial interests. And there are good reasons to believe that the quality of the Encyclopedia suffered in various ways owing to just that.[85] Yet, the attitudes reflected in the structure of *The Oxford International Encyclopedia of Legal History* are not an exception. They simply correspond to the orientation toward new markets, for which these reference works are designed, and as such, they reflect the entry of new regions that are interested in legal history.

Indeed, the past decades have seen the strengthening and development of new communities of legal historians all over the world that practice Legal History in a radically different manner than how it is traditionally done in the German speaking world. While one increasingly witnesses lively debates among legal historians in the US, their topics and questions as well as the institutional contexts in which their debates take place, obviously are different from the German tradition. Since two decades, in China and in other countries in Asia, the political reform efforts, and the historical legitimation that they sought, have invigorated the field of Legal History. Nowadays, the history of Chinese law is becoming an increasingly lively field of research in and outside of Asia, in fact to such an extent that now some scholars already proclaim a »New Legal History« of the Chinese law, a clear manifestation of differentiation and thus growth.[86] Also Latin America has developed

79 Available online as part of the Oxford Reference http://www.oxfordreference.com/.
80 Katz (2009).
81 Katz (2009), vol. 3, 117 ff.
82 Katz (2009), vol. 1, 399 ff.
83 Katz (2009), vol. 1, Preface xxi.
84 »This entry contains five subentries, on marriage in ancient Greek law, in Chinese law, in English common law, in Islamic law, and in Hindu law. For discussion of marriage in ancient Roman law, see Persons, subentry on Roman law. For discussion of marriage in medieval and post-medieval Roman law and in Unites States law, see Family, subentries on Medieval and Post-Medieval Roman Law and United States Law«, Introduction to the article »Marriage«, Katz (2009), vol. 4, 152.
85 Critical about this encyclopedia Osler (2010).
86 You (2013).

its own lively tradition of Legal History that combines careful archival work with theoretical ambitions. In this region, comparatively few scholars have historically shown an interest in the »German tradition« of Legal History, albeit with notable exceptions. Instead, an emergent strand of Legal History has combined Legal History and Social History to form an innovative field of History of Justice. Today, in countries such as Argentina, Brazil, Chile, Mexico, and Peru, scholars investigate the legal histories of their own countries, not least with a special focus on the dysfunctional nature of the import of norms. They inquire into the conditions of creating a just society and the historical constraints to that. Thus, in a way we are already witnessing what in some fields of global studies is being proclaimed as a goal: a certain decentralization of research and an emancipation of European categories, topics, and practices.

Obviously, epistemic decentralization is an important goal – and a big challenge. But before reflecting on this, let us ask what this means for the German legal historians. In the first place, it is a huge inspiration for our own work. The questions that legal historians from these different traditions ask might not correspond to our set of questions. But legal historians, especially from areas like Asia, Latin America, or Africa, tackle big topics, such as law under the conditions of limited and incomplete statehood, legal pluralism, or the challenges of diversity. Even though the experiences that motivate these legal historians might be alien to German scholars, the questions and insights they arrive at could also become increasingly relevant in Germany and in Europe. As in other areas of knowledge, an exchange with the so-called »Theory from the South« holds much potential.[87] But we cannot ignore the fact that in this process of decentralization the agenda for research is no longer designed in Germany. Theoretical foundations, key texts, and questions and approaches for the most part no longer originate in the German-speaking world. Moreover, due to the increasing influence of ›globalizing theories‹, like those of Foucault, Bourdieu and others, translated into English, Spanish, and Chinese, the analytical frameworks developed within the specific German traditions of legal historical analysis are known to a lesser extent.

This diminished relevance of German legal historical scholarship might simply be seen as a problem for the self-esteem of German legal historians. But it will become more so a problem for the quality of legal historical research as such, in the way that there is not ›less‹ attention, but a complete loss of attention for some European traditions, as the French, or the German, as one sometimes is forced to acknowledge when looking at English language books on Legal History, which completely overlook the German or French research, even when dealing with subject matters intimately related to Germany, France or Europe.

3.1.5 The Digital Revolution

Many of the changes I have highlighted so far are closely connected to the so-called »digital revolution«, which represents the last field of change I want to address in this section.[88] While legal scholarship has since recently begun to evaluate the implications of this revolution for law, there can be no doubt that its research practices and institutions have already changed.[89]

The digital revolution, however, did not just come out of nowhere. Electronic data processing has long had implications for law and for how research in law and history has been conducted. Primarily, Legal Informatics, but also Legal Sociology and Theory dealt with these implications in the 1960s and 1970s, albeit in conjunction with other sub-disciplines. Niklas Luhmann, for example, wrote his post-doctoral habilitation thesis on the relationship between law and automation in public administration.[90] The significance of electronic media for the study of law also became an object of reflection very early on.[91] In the field of History, quantitative methods and the use of computers to analyze texts in the 1970s bolstered the development of several disciplines, such as demography and social history. In fact, one spoke about »Humanities Computing« long before the advent of the Digital Humanities.[92] Since the 1970s, legal

87 Comaroff / Comaroff (2012).
88 See in general terms Castells (2004) 31 ff.
89 For an overview of the connection between the production of knowledge and globalization Wendt / Renn (2012); Stichweh (2003).
90 Luhmann (1966); see also the important essays by Fiedler (1962); Simitis (1967); Haft (1968). For an overview of the history of science see Gräwe (2011) 35 ff.
91 See e. g. Sieber (1989); also Zöllner (1990).
92 Hockey (2004).

historians have also increasingly made use of databases.[93] But it was in the early 1990s that the field expanded and even new institutes began to be founded,[94] while several scholars reflected on the relationship between law and the changing media world, not least with an historical eye toward the relationship between legal systems and media-change.[95] On a more practical level, in 1996, the first online Legal History journal was established in Germany: the *forum historiae iuris*.[96] Several digitalization projects spawned at around the same time,[97] and now Legal History can boast of several blogs and a growing number of electronic communities.[98]

The impact of such phenomena as the World Wide Web, email, and other forms of social media goes beyond the mere increase in storage capabilities and thus an optimization of established ways of researching by means of electronic tools as had been the case until the late 1980s.[99] Already in the early 1990s, several observers realized that there was more at stake than a simple change in the media landscape.[100] And indeed, the deterritorialization of communication that accompanied the digitization of academia has substantially affected how research is being conducted and published.[101] As such, digitization contributes to this transformation of the academic system, as one among many factors and developments that are commonly referred to as »globalization«.[102]

These changes are not without consequences for disciplines with an historical bent.[103] They do affect all aspects of a discipline, and thus also the integration or disintegration of disciplines. The possibility of publishing online, the digitization projects, and the open-access policies have made sources and secondary literatures accessible to scholars working in a variety of epistemic cultures all over the world. As a result, archives, institutes, libraries, and the communicative networks surrounding them now no longer serve as a mechanisms of socialization as before: it might sound strange, but in historical research, whole research agendas and even theories were born in spaces that offered opportunities for unforeseen communication, like the famous cafeterias of archives. This end must now be accomplished through different means – for example, by building digital research environments for newly developing communities of scholars.[104]

Digitization of academia has also had important consequences, as already mentioned, for the internationalization of research, and thus its results. Researchers from all over the world approach sources with new questions and work within intellectual and analytical frameworks different from the traditional frameworks that once supported more nationally bound research communities. Traditional arenas for scholarly conversations and exchange, such as conferences and journals, now have new rivals that demand independent space to conduct and showcase research. Mailing lists, such as H-Net, which was founded in the 1990s, have radically changed how scholars exchange information. H-Net alone has around 100,000 subscribers, who choose from an offering of more than 100 subject-lists to receive between 15 and 60 emails daily, containing book reviews, conference reports, and calls for papers.[105] Furthermore, many publications – reference works and handbooks especially – are now no longer written for specialists, but aim to popularize the results of scholarly research. They are produced for new international markets and are often part of commercial information infrastructures, such as Oxford Reference.

These changes in publication politics, combined with the increasingly porous boundaries of

93 See the essays in Ranieri (1977); Ranieri (1986).
94 Such as the foundation of the Juridical Internet Project Saarbrücken in 1993. For an overview on the development see Pohl / Vogel (2010).
95 Boehme-Nessler (2008); Vesting (2007); Vismann (2011).
96 Haferkamp / Meccarelli (2003).
97 Amedick (2003a); Amedick (2003b).
98 An overview offers fhi – forum historiae iuris, URL: www.forhistiur.de.
99 Castells (2003); Castells (2004).
100 On the law see Katsh (1989); Katsh (1995); on the scientific system see Stichweh (1989).
101 Very informative the observations by Taubert / Weingart (2010).
102 For a contemporary diagnosis see Doering-Mantteufel / Raphael (2012); for a science-policy context see e. g. Mohrmann / Ma (2008) and for Germany's position in this process see Baker / Lenhardt (2008). On the globalization of the scientific system and the expansion of transnational networks and communication structures cf. also King (2011) as well as Wildavsky (2010).
103 For an inspiring overview on some changes from the standpoint of historians see Crivellari / Kirchmann (2004); Haber (2011), esp. 141 ff.
104 This is one of the objectives, for instance, of a long-term research project on the so-called School of Salamanca, see Duve / Lutz-Bachmann (2013).
105 https://www.h-net.org/about/, accessed 17.03.2014.

disciplines as well as the opening up of new regions have had mixed consequences. There are new opportunities and stimulating exchanges, and more equal research opportunities can be provided, in as much as physical access to excellent libraries or archives is no longer a *conditio-sine-qua-non* for research. This is the positive side. But these changes, together with the economization of academia, have brought with them an inflation of publications. However, at the same time, established mechanisms of selection and hierarchization no longer operate effectively. Disciplines are no longer able to concentrate their scholarly attention to a limited set of problems. Similarly, mechanisms that used to safeguard quality and reputation also no longer function effectively. Thus, we are facing an increasing number of publications, and academic activities, not necessarily resulting in mayor knowledge, but perhaps even in less, due to the diffusion of efforts.

Let us leave aside for the moment how one might evaluate this on a more general scale and turn our attention back to what this might mean for German legal historians. The developments I describe have led to the erosion of canons of knowledge and analytical approaches developed by legal historians in Germany. In light of the emergence of more global communities, the German approaches and the knowledge they produce emerge as distinctly limited. Indeed, their contingency becomes impossible to ignore. This is not astonishing, and it could not be different. In addition, the gradual disappearance of German as an internationally significant language of scholarship in Legal History, the dynamic growth of legal historical research in other regions, combined with a significant reduction in research output that is intellectually or institutionally connected to German legal scholarship and its research agenda have all contributed to a lowering of the German share in the discourses. Colleagues from history departments claim that in the 21st century their discipline will already have developed an entirely new library of reference works that facilitate communication across all cultural and language barriers.[106] The field of Legal History has not arrived there as yet. However, any such a library is inevitably going to contain fewer works originating within the German tradition. This is, if one wishes to propose a balance, the negative side. On the other hand, there is also a positive perspective on these developments: because what seems a loss from the perspective of tradition, at the same time, might be an opportunity, seen from a different perspective – the perspective of a Legal History being part of a Transnational Legal Scholarship; I will come back to this in the final part (4).

3.2 Changes in Legal History in Germany

Yet, over the last 25 years, not just the conditions and the environment of Legal History has changed. The discipline itself has undergone deep transformations. Again, only a few aspects can be highlighted here.[107]

Firstly, the differentiation within the field that began to take hold in the 1970s and 1980s has continued and borne many fruits. In many subfields, legal historians in Germany have continued to pursue a path they had embarked on in the late 1980s and early 1990s, and many can show important results of long-term projects and impressive life achievements. Limiting oneself to some fields, one can point to the History of Public Law,[108] Constitutional Law,[109] the History of High Courts,[110] History of Canon Law,[111] Early Medieval Legal History,[112] the History of Legal Method,[113] that have strengthened the connection of historical and comparative approaches to law,[114] and a new History of Private Law, open to the methods of Social History that has rewritten or replaced many building blocks of basic reference

106 Raphael (2010) 269.
107 For a broad survey on the recent developments in the legal-historical research, see Sordi (2013). Cf. on the different aspects of the development in legal history in the years following 1989 Stolleis (2011b), surveys published in the special issue of Zeitschrift für Neuere Rechtsgeschichte (2010), see in particular Diestelkamp (2010); Modéer / Nilsén (2011).
108 See e. g. the review in Stolleis (2012a) 677 ff. as well as the contributions in Rechtsgeschichte (2011).
109 Willoweit (2009).
110 Diestelkamp (2014).
111 Landau (2010); Landau (2013).
112 For a panoramic overview see Dilcher (2008).
113 Schröder (2012).
114 See Modéer (2013) for an extensive survey; also Ibbetson (2013).

works, including the influential conception proposed by the Historical School, and the History of Germany's Civil Code (BGB). [115]

The *Berliner Republik* scholars have also opened up new fields of research. The legal history of the GDR and of other countries once locked behind the Iron Curtain has garnered much attention over the past twenty-five years, as too the relationship between law and totalitarianism. [116] Yet another set of scholars has turned to the history of economic law, [117] of regulation and governance [118] as well as to the history of the relationship between law and media. [119] Legal historians in Germany are now aware that they would need to write the history of legal regulation affecting distinct areas of social life, not just the history of discrete fields of knowledge. As a result, fields such as Law and Technology, or Law and Religion, garner ever more attention. [120] History of International Law was also a relevant and influential topic of interest during the *Berliner Republik*. [121] The past twenty-five years have spawned new textbooks, handbooks, and journals, forms of publication have undergone change, and international exchange has intensified. To a certain extent, we can see that Legal History is already transitioning from a national to a transnational institutional field of research. [122]

While these advances are to be welcomed, there is also some reason for preoccupation. Most research projects over the past twenty-five years were not initiated and carried out by established chairs in Legal History. Instead, they were accomplished with the support of third party funded projects or at independent research institutes. In light of the hypothesis with which I started this paper – namely that the production of scholarship is shaped by the conditions in which it takes place – it is even more disquieting that all the new research has barely left its mark on the institutional framework of Legal History in Germany, such as chairs, curricula, or teaching. Most of the innovative research has not been transformed into institutional structures: we do not have more chairs on, for example, History of Public Law; History of International Law, etc.

There are many reasons for this absence of institutional response to what clearly is a changing field: scarce resources, general institutional inertia, and risk-aversion within a field that is threatened to begin with. However, the absence of an institutional response might also derive from the fact that legal historians now carry out and present their research in interdisciplinary contexts, both intellectual and institutional. One only needs to think of the many joint research projects that they participate in. Thus, the danger is that legal historians lose intellectual contact with the disciplinary field that still offers the institutional structures they need.

4 Future Options

In light of what has been said so far – what perspectives and options emerge? How might the changing environment, the transformations of the institutional and communicative conditions of our work impact on our discipline?

Obviously, my intention is not to define a set of ›tasks‹ for Legal History, or to ask, as many did rather torturedly during the *Bonner Republik*, »Legal history, what for?« [123] Scholars in all subfields of Legal History – be it ancient, medieval, modern – know best what their motives are and where their intellectual and institutional opportunities lie. They might believe in offering guidance to other jurists through historical reflection or provide a propaedeutic to the study of law. They might see themselves as part of a legal scholarship that focuses on the doctrine, or as a part of comparative legal scholarship or of general history (with all its subfields and goals). Some might also view Legal History simply as a space for reflecting on the legal system as such, or for generating new ideas on the responsibility of jurists, or hope that their research

115 Cf. the volumes of the legal Historisch-kritischer Kommentar, in particular Schmoeckel / Rückert (2003); Rückert (2010).
116 Stolleis (2012b).
117 See e. g. Schmoeckel (2008); Gschwend / Pahud De Mortanges (2009); Maetschke / Mayenburg (2013).
118 Collin / Bender (2012).
119 Vismann (2011).
120 See e. g. Vec (2011b); on religion and law see e. g. Jansen (2014).
121 See e. g. Nuzzo / Vec (2013).
122 On transition from national to global scientific systems see Stichweh (2000).
123 See for example the debates in Rechtshistorisches Journal (1985); Rechtsgeschichte (2003), Rechtsgeschichte (2004), Simon (2014). From an English perspective, Lobban (2004).

and teaching helps foster a sense of what is possible in society. Perhaps, they just like what they are doing, like musicians, or artists, which is perhaps not the worst motivation.

And yet, notwithstanding this multiplicity of motivations and approaches, I believe that the survey of the changing conditions of our research indicates that certain structures for knowledge production, so too the fields of research, are beginning to emerge in a way that will generate a stimulating institutional and intellectual environment that will forcefully demand greater engagement. In other cases, it does not seem very probable that we will witness intellectual and institutional growth. Thus, I want to conclude my deliberations with a brief summary of my argument (4.1) in order to then highlight where I, personally, see potential for intellectual and institutional growth (4.2).

4.1 The Changing Context of Legal Historical Research

Looking back, we can see a fascinating but also a somewhat intimidating panorama: Legal history seems valued, and indeed indispensable to transnational and transdisciplinary research on law and normativity. Disciplinary boundaries have become diffuse. There are more and more players in the field, and traditional German Legal History is losing ground. Disciplinary canons are in danger of being eroded away as scientific communities stemming from national research systems are experiencing radical internationalization. Worldwide, new discursive communities are emerging, and suddenly, new and partly converging approaches and theories from neighboring disciplines and new regions are on offer. The discipline certainly benefits from the new ways in which research is being funded, which comes with its own set of opportunities and pitfalls, but that did not succeed in transforming the structures for the production of knowledge on a sustainable basis. The process of internal differentiation among universities in Germany has provided legal historians with new opportunities, as there is a political will to support and intensify the development of research in the fundamental subjects of law – but they still remain opportunities that must be converted to new realities.

Almost all these observations can be set in relation to the structural changes in academia and in the legal systems, which can only be described using the common buzzwords of ›globalization‹, ›digitization‹ and ›economization‹ of European societies in the past twenty-five years. As the survey showed, these three processes combined, and their concrete consequences, affect the very foundations of our discipline, which came into being within the nation state framework and still bears a strong connection to the legal and academic system that it was built upon. That is now facing the consequences of transnationalization, and thus transformation, of its object, the law, and its institutional context, the science system.

Thus, Legal History has to find a way to navigate in this complex environment of changing and changed contexts. From the perspective of traditions, from a national perspective, and that of a more or less integrated discipline, we face a vast range of risks and losses. Some colleagues feel that Legal History is not what it was before. To a certain extent, they are right; this year's issue of the Journal *Rg* is a proof of that. Yet, viewed differently, the emergent transnational scholarship offers avenues for generating fascinating intellectual and institutional perspectives. Moreover, the survey on the changing conditions of our research has shown that many of the preconditions for this transformation already exist, in due part to the same processes that might seem a threat to the established paradigm: Much of what I presented as a loss is also an opportunity.

4.2 Legal History and the Transnationalization of the Academic and Legal System

This brings me to some final thoughts on the opportunities we might want to seize to further our discipline in this strong wave of transnationalization and ›deterritorialization‹ of research. It seems to me that there are at least two dimensions to which we must remain attentive: the transnationalization of the science system (4.2.1) and the transnationalization of the legal system (4.2.2), both closely intertwined.

4.2.1 Legal History and the Transnationalization of the Science System

As I have tried to show, in general, Legal History in Germany is faced with the rapid transnationalization of the science system. There are different

ways to react to this: One option would be to simply ignore these changes and to continue with what we have been doing until now; another option would be to hope that these transformations are merely passing fashion trends that will fade with time. A third option could be to delve right into Transnational Legal History and forget about all our national traditions; a fourth option would require a cautious adjustment of our intellectual and institutional agenda to this changing environment. Obviously, I am advocating for this last strategy. [124]

In doing so, we confront a dual challenge: while we have to continue with our own research agendas defined by the logic of a traditionally shaped discipline, at the same time, we must also conceptualize and formulate our research so that we are a part of the new and emerging transnational discourse on Legal History.

Let us look at both sides. It might not be necessary to argue too much in favor of the necessity of persevering with traditional research agendas. Every legal historian knows about the research to be carried out within the local, national, regional field of research, and the brief review on the intellectual growth in our discipline has shown the richness of activity and results (3.2). The growing activity and the rise, for example, of the Chinese Legal History should obviously not have any impact on this agenda whatsoever. In debates on Global History, we have been asked whether we were all »Global Historians« now. [125] I do not believe that is the case. Moreover, it is not only legitimate to work on our own local or regional legal history, which is indispensable for studying our history and traditions, integrating or not global perspectives. Continuing research on our own legal tradition has even greater importance if transnational legal historical scholarship has to function, as such scholarship relies on integrating different traditions. Thus, we have to revisit and reconstruct our past and repeatedly renew our connection to it for a successful transnational dialogue on fundamental issues: A Global Legal History needs local legal histories and the analytical traditions corresponding. With whom would the experts on the history of law in Asia or in Islamic countries converse if, for example, in Germany or Europe, no one had the requisite expertise to speak about Christianity's impact on our legal system? Or about how the modern European state emerged, or what special historical contingencies led to the evolution of the adjudication systems we now have in western societies? These questions, of course, can only be studied by integrating our analytical traditions and by further advancing the state of knowledge on the matter. Thus, there are good reasons to keep on contributing our share to this evolving research. Obviously, this requires professional expertise. If transnational scholarship means ›plurality‹, as a principle of efficiency or epistemic justice, contributions on relevant discourses must be generated- somewhere and by someone. As a result, we have to foster and pursue research on our own traditions.

At the same time, however, we have to be able to conceptualize and present our research in such a way as to make it amenable to transnational scholarship. It is important then to overcome the language barrier that publishing exclusively in German increasingly produces. Yet while lingual translations are of increasing importance, they are not sufficient by themselves. The challenge we are facing is much bigger. We must – at least heuristically – be willing to question our own established categories, approaches, and principles, and be open to other conceptualizations of normativity and institutions, for different internal categorizations of law and legal scholarship, and – above all – for different questions. Legal History might thus become the historical study of normativity and its practices, which is not limited to what we call law. Legal History would then study the specificity of the form of normativity, which contingent conditions have transformed into a concrete phenomenon we call ›law‹ and ask how it relates to other modes of normativity (›Multinormativity‹). Similarly, we would have to develop a transnationally useful conceptual apparatus to study the history of the decision-making systems. We will also need to analyze the transformations that occur in the process of reproducing normative options stem-

124 See on the challenge of Legal History through Transnational Law and Globalization Cairns (2012); Ibbetson (2013); Costa (2013); Duve (2012); Duve (2013); Duve (2014c); Letto Vanamo (2011) and not least the contributions in this issue of Rechtsgeschichte – Legal History.

125 Ittersum / Jacobs (2012).

ming from one context in a different context (›Cultural translations‹), to better understand how legal spaces emerge. Thus, we need to develop a ›meta-language‹ for transnational communication about our legal histories. [126]

Obviously, we cannot draw on and offer such concepts based exclusively on a previous understanding of our history. On the contrary, this meta-language needs to be developed in de-centralized discourses. As historians used to dealing with the relativity of their concepts, we should be especially open to new ways of synthesizing such transnational concepts. The rise of global history as a field has increased scholars' sensibilities to such an approach and legal historians should be able to learn from them. [127] As legal historians, we can also look to neighboring disciplines such as Anthropology, the Sociology of Culture, and also ›General Jurisprudence‹ in order to advance the historical analysis we undertake in our own work. [128]

To be sure, such a Transnational Legal History, and the degree of intellectual decentralization it entails, requires stable institutional frameworks. Here again, we are facing two challenges, mirroring what has already been said about the intellectual challenge. For, on the one hand, we need to stabilize an established discipline, because we need the mechanism to introduce scholars, guarantee quality control and efficiency in knowledge production within the disciplinary structures. Thus, some institutional continuity is indispensable. At the same time, we have to increase our presence in a continually evolving global academic system, for which we also have to be able to rely on institutional frameworks.

Thus, in order to maintain our national and disciplinary profile, we need to secure our institutional position within Law Departments. It would be dangerous to opt for an intellectual and institutional separation from law. And we must assume the responsibility of integrating foundational subjects, such as Legal History, with those that mainly focus on Legal Doctrine. Else, we will have failed to communicate with our colleagues. More institutional spaces must be created to facilitate such encounters, a challenge that Law Departments in Germany have not yet tackled; Institutes for Advanced Studies in Law, or bigger research projects that could create these spaces within the Law Departments, but also expanded post-graduate programs, are examples of institutional spaces we have not yet been able to realize. [129] At the same time, the presence of Legal History in global academic discourse, the second dimension of our work, also requires institutional support, especially to foster research on transculturally useful approaches. Daily life at the university rarely affords the structures required for these purposes. Here again, the establishment of research projects that span across regions, of research institutions and more teaching opportunities in the context of Graduate Schools, or more intense collaborations with area studies might be a particularly useful means to make a transnationally organized scientific community of legal historians possible. [130]

4.2.2 Legal History and the Transnationalization of the Legal System

The second dimension that seems important, as already mentioned, is the transnationalization of the legal system. This transnationalization already exists (4.2.2.1), and so too, as a consequence, the demand for a Transnational Legal Scholarship (4.2.2.2), which in turn entails epistemic and theoretical challenges (4.2.2.3). Legal History could and should respond to these challenges.

4.2.2.1 Transnational Law

As already mentioned (3.1.1), today the world of law can no longer be easily divided into national, regionally integrated or international

126 See on this more extensively Duve (2012) 48 ff. as well as Duve (2013); Duve (2014c).

127 For an overview on the impact on the perspectives, see Conrad (2013); for analogous recommendations that have been made in comparative law see Schacherreiter (2013).

128 Cf. also see Tamanaha (2010); Menski (2012) for recommendations of social anthropologists on governance, see Gulliver (1979).

129 Obviously, there are notable exceptions, like the Cluster of Excellence »Formation of Normative Orders« (Frankfurt), the LOEWE Research Focus »Extrajudicial and Judicial Conflict Resolution« (Frankfurt), the Cluster of Excellence »Religion and Politics in Pre-Modern and Modern Cultures« (Münster), the Collaborative Research Center »Governance in Areas of Limited Statehood: New Modes of Governance?« (Berlin), and others.

130 Duve (2014a).

spheres. Owing to the growing globalization, deregulation, and digitization of our societies, for decades, there has been a process of ›denationalizing‹ law and justice, delegating more and more space to the regulation of the private sector. In many areas of life, agreements traditionally made on the basis of national laws must now also rely on normative frameworks of non-state laws.[131] For most part, these normative frameworks, and the corresponding adjudication institutions, are brought into being to regulate situations that transgress the boundaries of national jurisdiction. Transnational cases of that nature have risen in the past decades in the course of mobilizing people, goods, and capital across borders. New non-state norms and decision-making institutions have emerged – in the regulation of the Internet or in sports; in fact, some jurists speak of *leges oeconomicae*, *lex digitalis, lex sportiva*, etc. With that, new forms of extrajudicial settlement have replaced state judicial instruments; forum shopping can be practiced more widely, albeit with significant economic and legal consequences. The trend to enhance Global Governance has given rise to new rules and instruments of enforcement, which have a similar effect on individuals established legal modes for controlling behavior and enforcing sanctions for misconduct, in part even exceeding them. Especially the so-called developing countries are experiencing this, in many cases, with harsh consequences, because safeguards developed within national legal frameworks against market monopoly as well as control mechanisms and legal protections are commonly evaded. In a parallel process, we have witnessed a significant upturn in the export and import of law and allied services since the 90s, which has hugely advanced the cause of Anglo-American law.[132]

However, the phenomenon of a non-state normativity that transcends cultural boundaries is not just restricted to the world of economy, sports, or neo-liberal reforms introduced in the non-US-American and non-European parts of the world. With growing (and more frequently observed) diversity within our own societies, the importance of normative spheres independent of a specific national legal framework, and sometimes separate even from a dominant culture in the immediate environment, is becoming perceptible in our daily lives, even within Europe. Rules deriving from religious convictions are lived and enforced within national legal orders of which they are not an integral part. Some cases involving the so-called ›parallel judiciary‹ have attracted strong public attention. As I have briefly mentioned before (3.1.1), these developments raise the question of how normative orders and decision-making systems that have grown independent of state structure can be legitimated, controlled, and integrated into the existing, state-centered legal orders. Thus, there are lively academic debates, and we can observe, especially in the English-speaking world, the institutionalization of ›Transnational Law‹ through research programs, databases, journals, books series, and new curricula.[133] Transnational law has become an important domain for legal scholarship.

4.2.2.2 Transnational Legal Scholarship

Still, this impressive growth of Transnational Law, its institutionalization and the scholarly discussions about it do not automatically imply the emergence of a ›Transnational Legal Scholarship‹. The case of the European Union might be a useful example to illustrate this. For decades, we have increasingly being subject to European Law as well as university courses, books, and institutions dedicated to research on European Law. But still, in most cases European Law continues to be studied from a national perspective. Legal scholars have basically been looking for a way to understand and integrate it into their own national systems. The intense discussion about the need for a ›European legal scholarship‹ is a fairly recent phenomenon that owes it currency to the emergence of European Law as a Transnational Social Field. According to its advocates, a European strand of transnational legal scholarship would represent not merely an aggregate of the traditions and practices

131 For panoramic views on this from different disciplinary perspectives see Sieber (2010); Kadelbach/Günther (2011); Grimm (2012); Berman (2012); Zumbansen (2012).

132 On this see now Reimann (2014).

133 For example Dedek/De Mestral (2009); Menkel-Meadow (2011); Chiesa/De Luca (2009) and Leibfried/Möllers (2006). For an useful overview see Catá Backer/Stancil (2011); Jamin (2012).

of legal scholarship in European nations. In fact, a legal scholarship would Europeanize its basic concepts and methods. Thus not just the member state laws, and in similar vein, not just the EU institutions, but rather Europe in its entirety must become the frame of reference for scholarly work. German legal dogmatics »in this context would have to necessarily adopt a new orientation«, as Armin von Bogdandy pointed out.[134] Due to the high self-confidence of German jurists, one might imagine that this is not an easy task. But it is not only a question of pride or losing market shares, but this is a sensitive issue, because in final analysis, while the vast majority of laws may have been inspired by European law, they are brought to bear by national law-makers, lawyers, and courts, within a national framework. So German legal scholarship can and should not ›Europeanize‹ completely, but must develop a European dimension – just in an analogous way to what has been said about the necessary combination of national and transnational logics in Legal History.

This short glimpse at the attempts to create a European legal scholarship might already anticipate the huge challenges connected with a transnational legal scholarship that is not confined to Europe, but would refer to a global space. For within Europe, legal scholarship can draw on a legal vocabulary and grammar evolved in a century-old communication process. But such processes that foster this form of cohesion simply do not exist on a global scale – even though there are voices advocating the inculcation of a shared global legal culture.[135] And while Europe is having a solid institutional framework within which legal scholarship evolves in an environment of political, economic, and legal integration in order to base the research agenda on common topics, methods, practices and infrastructures, that cementing element must yet be created to carry out transnational legal scholarship on a global scale.

However, we need to urgently address the issue of transnational legal scholarship, because of the very mission of legal scholarship. As in the case of European law, which initially began as a discipline for Europe-enthusiasts, the ongoing debate on Transnational Law is largely carried out by interested actors. Their motivation is to win market segments, whether in the realm of academia, legal counseling or adjudication. This strong presence of voices guided by market interests is *per se* not bad. But it needs to be counterbalanced, and its strength can only be diffused through institutional frameworks that encourage the participation of other worldviews, legal cultures and discourses, which explore the risks involved in the transnationalization of law as well as propose possible strategies to overcome those risks. In other words, we need to develop a transnational legal scholarship that provides the space for a critical exploration and examination of the legal system, a quintessential endeavor of all legal scholarship. Thus, it is important to involve academics in this discourse, and not just legal practitioners, in order to create a sustainable institutional framework that stimulates research and invests scholars' opinions with authority.

4.2.2.3 Epistemic and Theoretical Challenges

Such a non-ideological transnational legal scholarship that generates critical perspectives in the best possible sense is not merely an institutional challenge, but predominantly an *epistemic* and *theoretical* one.

It needs – and that is what is meant by *epistemic* challenge – the willingness and the capacity to be free from tried and tested categories, methods, and principles for heuristic purposes. It must be deemed open to alternative ideas of normativity, to different internal structures of law and legal scholarship, also to a broad spectrum of ideas generated by academics from different cultures, because a transnational legal scholarship cannot be conceptualized according to the national tradition of one single participant in a discourse, not even on the basis of one region. It must allow diverse legal cultures and traditions to enter into a dialogue with one another, to collaborate on research questions before subsequently processing them, and to allow participants to learn from one another. This epistemic challenge might entail generating and accumulating a lot of what might seem ›non-juridical knowledge‹ and developing corresponding research infrastructures to do so, and all this must have an impact on the academic *curricula*.

134 Bogdandy (2011).
135 Friedman (2014).

In addition to this, transnational legal scholarship also poses a *theoretical* challenge. It must ask if and how we can conceive of an analytical framework that is adequately wide-ranging, devoid of cultural assumptions, open to the normative ideas of the entire world, but one that still somehow manages to retain analytical force. Both types of challenges, the epistemic and the theoretical, have been discussed in the last years, mostly under the rubric of General Jurisprudence, meaning a legal doctrine that examines the structural elements of transnational law within the context of globalization, by authors like Brian Tamanaha or William Twining. This discussion has already shown that a transnational legal scholarship that conforms to these standards must also be especially receptive to its ›neighboring‹ academic disciplines. In a sense, it can only be based on a transdisciplinary approach. Formulating a common vocabulary for law and normativity is an example: A transnational legal scholarship requires consensus on the normative spheres to be incorporated into discourses on normativity, and into the corresponding conceptual framework. Merely resorting to the term ›law‹ and its linguistic equivalents would give rise to misunderstandings, or again propel state-legalistic concepts to center stage. Not only would that complicate dialogues with other cultures, it would also generate a form of circular argumentation; normative spheres that fall outside its scope, or differences that remain veiled owing to polysemy, would be disregarded.

For these reasons, a transnational legal scholarship must derive its analytical framework from an empirical approach that allows fields of normativity to be ascertained and systematically ordered, in other words, through an empirically founded model comprising different categories of normativity that has intercultural legitimacy. That requires cooperation between disciplines directly concerned with law, but also with those who work on different socio-legal arenas – and do not reside just within Law Departments. We need other disciplines – Anthropology, Sociology, Religious Studies, etc. – and scholars with regional expertise. Finally, transnational legal scholarship has to draw on legal historical work, and scholars working within this field already do so to a considerable extent. Thus, many questions are being asked of us – old and new ones. In this field, our problem is not the lack of interest in our field of study, but our lack of preparation to provide appropriate answers.

4.3 Conclusion

The aim of this article was to review the changing environment of our discipline and the transformations in the conditions of knowledge production, and to inquire into the options emerging from this. Obviously, we cannot predict the future, and perhaps much of what I have written might in hindsight prove to be wrong, or simply utopian. Still, I believe that it is quite probable that the transnationalization of law is here to stay, and that legal scholarship has to develop a transnational dimension to respond to these changes. Thus, our objective must be twofold: to continue with the research in our own traditions, enriched by a global dialogue and its perspectives. At the same time, we have to structure our knowledge in response to the logics of a transnational scholarship, be that in History or in Law.

As for transnational legal scholarship, Legal History can substantially contribute to this field of study, since this type of scholarship will not be possible without a historical dimension. The demand for legal historical expertise is palpable everywhere, and we should not fail to address these needs. Entering into the domain of this transnational dialogue, and adopting ›global perspectives on legal history‹, we might even discover aspects of our own legal past that had previously eluded. [136] Thus, even the traditional research on our own local, regional, national past might benefit from this transnational dimension. There is no doubt that the future holds exciting prospects for Legal History.

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136 See on this Duve (2012) and Duve (2013) as well as the forthcoming first volume of the new series Global perspectives on Legal History (GPLH), Duve (2014b).

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